MALAYSIAN REPORTS

LEE POOI CHUN v. LEE KAH GEE

[F.C. (Ong C.J. (Malaya), Gill F.J. & Raja Azlan Shah J.)
March 24, 1971]

[Penang — Federal Court Civil Appeal No. 96 of 1970]

Landlord and Tenant — Oral assignment of tenancy — Exclusive possession of premises given — Subsequent written agreement — Sham agreement to give original tenant colourable interest in premises — Illegality.

Practice and Procedure — Costs — Excessively prolix defence — Discretion of court — R.S.C. 1957, O. 19 rr. 4, 21, 22 and 24.

The respondent who had carried on business as a druggist had made an oral agreement with the appellant, whereby he agreed to vacate certain premises and to deliver possession of the premises to her upon her taking over the druggist business as a going concern. Subsequently in order to give the respondent a colourable interest in the premises, a written agreement was entered into between the parties whereby the business was purported to be leased to the appellant for a period of seven years. The respondent applied for repossession of the premises and the learned trial judge gave judgment in his favour, as he held that by the terms of the written agreement, the appellant was only a licensee of the premises.

The issue before the court was whether by the oral agreement it was the agreed term of the contract that the sale of the business included assignment of the tenancy.

Held, allowing the appeal: (1) in this case it was clear that in pursuance of the oral agreement the respondent and his family vacated the premises and gave exclusive possession of the premises to the appellant;

(2) the written agreement was a sham and as it was made with a view to evade the rent control law, the respondent by relying on it, was practising a deceit on the public administration;

(3) in the circumstances the respondent had not shown that he had retained any legal right or estate in the premises.

Cases referred to:-

(1) *Isaac* v. *Hotel de Paris, Ltd.* [1960] 1 All E.R. 348.

(2) *Palaniappa Chettiar* v. *Arunasalam Chettiar* [1962] M.L.J. 143, 146.

(3) *Errington* v. *Errington* [1952] 1 All E.R. 149, 155.

(4) *Facchini* v. *Bryson* [1952] 1 T.L.R. 1386.

(5) *Addiscombe Estates Ltd.* v. *Crabbe* [1957] 3 All E.R. 563, 571.

(6) *Goh Gok Hoon* v. *Abdul Hamid & Anor.* [1967] 1 M.L.J. 36.

FEDERAL COURT.

Karpal Singh for the appellant.

Lim Kean Chye for the respondent.

Cur. Adv. Vult.

Ong C.J. (Malaya): The respondent, plaintiff in the action, was the tenant of rent-controlled premises, No. 35 Kuala Kangsar Road, Penang, in which he formerly resided with his family and carried on business as a druggist under the name of Poh Cheh Medical Hall. The appellant was an illiterate widow against whom judgment for repossession of the premises was given by Wan Suleiman J. in the High Court at Penang on August 8, 1970.

On April 26, 1966 the respondent and all his family vacated these premises and delivered possession thereof to the appellant upon her taking over the druggist business as a going concern. The agreement they made was not in writing, but the respondent received a first payment of $3,000 and an inventory was taken of the furniture on April 25, 1966. By May 29, 1966 the appellant had paid up a total of $10,000. The facts, so far, were not in dispute. On June 20, 1966 these two parties and a third, the respondent's son, executed a further agreement in writing purporting to be a lease of the business — but excluding the premises — for a term of 7 years in consideration of payment of a premium of $21,000 by monthly instalments of $250.

On June 13, 1966 the appellant gave the respondent three cheques for $1,000 each, postdated July 1, August 1 and September 1, 1966. On August 1 1966 the appellant wrote to her bankers stopping payment of the first two cheques,

"if and when presented... as the transaction between the writer and the payee Lee Kah Gee has not been finalised as yet".

A carbon copy was sent to the respondent. On August 3, 1966 the respondent's then solicitor, Mr. Lee Kok Liang. issued two notices to the appellant, the first, under clause 4 of the agreement of June 20, 1966, terminating the lease of the business within 7 days and the second demanding payment of the said two cheques. Clause 4 of the agreement reads: —

"IT IS HEREBY DECLARED that the said premises No. 35 Kuala Kangsar Road Penang are not included in the lease of the business by the vendor to the purchasers and that the purchasers shall quit and vacate the said premises within seven (7) days on receipt of a written notice by the vendor to the purchasers of the withdrawal of the vendor's licence to the purchasers to carry out the said business at No. 35 Kuala Kangsar Road Penang without compensation to the purchasers".

The appellant's reply dated August 5, 1966 was in the relevant part as follows: —

"Your client induced me to hand him 3 cheques for $1,000 each post-dated to 1.7.66, 1.8.66 and 1.9.66 respectively being premium payable to him on his undertaking to assign the tenancy of the above premises in my favour which he said could be effected on or before 1.9.66 at the latest.

On 1.8.66 he demanded a further $3,000 to finalise the transaction to which I disagreed. In the circumstances I feel your client is not entitled to payment of the said cheques or at all. He has misled you and has not disclosed to you the full facts by which he maintains his claim".

In answer Mr. Lee Kok Liang wrote: —

"The sum of $3,000 is deposit against breakages or loss of shelves, furniture, apothecary tools, and equipments used in connection with the business of Poh Cheh Medical Hall Penang. No tenancy rights are involved. My client instructs me to refer to the agreement signed between you and your partner with my client whereby it is specifically stated that the lease is for business goodwill only and nothing else."

It evoked a reply at length from the appellant on August 10, 1966 stating that she had paid the full purchase price of $10,500 for the business (including stock furniture and fittings); that the respondent had agreed to assign to her the tenancy before September 1, 1966, pending which assignment she was paying him rent at $250 per month — as she had done for May,

[**Editorial Note:** Mr. Karpal Singh did not appear as counsel or solicitor for the appellant at the hearing of the matter in the High Court at Penang.]

June and July; and that, if he could not effect an assignment for $3,000 (which she would agree to pay, but not $6,000 as demanded by him) "he must not expect payment of the three cheques".

Although thus defied, the respondent took no action, while on her part the appellant continued her monthly payments of $250 until the 8th payment was made on December 31, 1966.

On February 7, 1967 the respondent gave notice to the appellant that her third cheque for $1,000 was dishonoured. It was followed by further disputation in correspondence until writ issued on July 24, 1967 by the respondent claiming repossession of the premises, return of the business, $24,950 as moneys due, damages and costs.

The respondent's case, briefly, was that, by clause 4 of the agreement, the premises were excluded from the licence to run the business and that, by reason of the appellant's default in payment of the monthly instalments of premium her licence to occupy the premises had been determined by notice to quit dated July 17, 1967 whereby the balance of the premium moneys also fell due.

The defence of the appellant, 26 pages long, was excessively prolix in disregard of the provisions of R.S.C. Order 19 rules 4, 21, 22 and 24. However, in a few words, it was to the effect that, in April 1966 for the price of $10,900 — reduced by mutual consent subsequently to $10,500 — the respondent had sold and transferred to her his business, including the tenancy; that in June 1966, when only $500 remained outstanding, the appellant was persuaded by the respondent to pay through him to the landlord a further sum of $3,000 for the landlord's consent to the assignment of the tenancy and to enter into certain agreements in writing in order to forestall ejectment proceedings by the landlord. As to the written agreement the appellant also pleaded that it was unenforceable for illegality.

The learned trial judge took the view that the appellant knew the meaning and intent of this agreement; that a subsequent draft agreement Ex. P.8, in which her foster-son, a lawyer's clerk, had made certain amendments provided an insight into the mind of the appellant herself; consequently, the judge was satisfied that when she signed the agreement (as well as a contemporaneous deed of partnership), she was well aware of their contents and had not done so by reason of any fraud or misrepresentation on the part of the respondent. In the result he held that, even though granted exclusive possession of the premises, the appellant, in the circumstances, was only a licensee, on the authority of *Isaac* v. *Hotel de Paris*[1] and the respondent was entitled to an order for possession, payment of $9,590 and costs.

In my view, however, the judgment cannot be supported. The learned trial judge can hardly be blamed if he found 60 wearisome pages of written submissions by counsel for the appellant too much for his fortitude and preferred to depend instead on opposing counsel's short reply of 13 pages for a summary of the case on both sides. Hence, as he said, he "inclined to agree with Lim Kean Chye's submission that in the interpretation of Exhibit P.1, Exhibit P.8 plays a most vital role". Thus it came about that in concentrating attention on the agreement of June 20, 1966 and the subsequent draft agreement intended to settle the disputes and differences between the appellant and the respondent, the original agreement made in April was entirely lost sight of.

The oral agreement of April 26, 1966 was pleaded by the respondent himself as plaintiff. It was fully executed on the part of the respondent by his delivering up his business lock, stock and barrel to the appellant as a going concern. By May 29, 1966 she had paid him a total of $10,000. Stock-taking and valuation did not take place until "a little over a month later" (see the respondent's evidence in chief) although she later said positively in cross-examination that "stock-taking was completed by 3 to 4 p.m. on 27th April 1966". Is it not a little strange that if the valuation of the stock-in-trade was thought at all material for a sale thereof, it could possibly have been deferred for so long, while the stock was being steadily diminished by sales to the appellant's customers. More significant still is that, while claiming that two persons Chow Peng Keong and Fong Kok Lim had so valued his stock at $10,900, Chow was never called as a witness, while Fong, his own witness, said he valued only a portion of the stock and *never finished* the valuation. The appellant, however, admitted she agreed eventually to a figure of $10,500, so that, if this sum was the total consideration to be paid under the oral agreement of April 26 1966, all that remained due was only $500.

At the time of this agreement it was also alleged by the respondent that he issued a receipt for $3,000 paid to him as deposit for furniture (Ex. P.2) by the appellant. For proof of such payment she had, of course, the cheque issued by her, but it is difficult to understand how the receipt which was said to have been issued *to her* should be produced at the trial *by the respondent* out of his possession. It is true Fong Kok Lim did identify this receipt as written by him at the respondent's request, but it should be remembered that whatever he knew of the transaction was admittedly based on what the respondent had told him.

Pursuant to this oral agreement it was common ground that the respondent moved out of the premises with all his family. The question therefore may be asked: why vacate the living quarters upstairs if only the business — which only occupied the ground floor — was leased, but the tenancy was retained by him? In this connection it is pertinent to note that the respondent said: "If she had offered me a larger sum (than $21,000) I would have arranged to let her have the tenancy". Therefore it would seem quite clear that, like Oliver Twist, he was still asking for more, although the appellant had agreed to pay, over and above the $10,500, an additional $3,000 to obtain an assignment of the tenancy.

Before examining the written agreement of June 20, 1966, I think it is necessary to consider the nature and effect of the oral agreement. It is plain that the appellant contracted for and was given vacant possession of the entire premises. It is equally clear that

the consideration therefor was the cash payment of a global price roughly agreed upon, but subject to some variation after examination of the stock. The price was fully paid on June 13, 1966 by a cheque post-dated July 10, 1966 (Ex. D.21). An initial problem facing the respondent was how to get round the sale of a tenancy, prohibited by the Control of Rent Ordinance. This was obvious, since the judge accepted evidence that an attempt to have a proper agreement drawn by a legal practitioner — and failing that, an agreement in Chinese — failed. Some receipt, of course, had to be drawn for the appellant's first payment of $3,000; so Exhibit P.2 was written stating that this sum was "pledge money for furniture of Poh Cheh Medical Hall". Its genuineness may be tested by a perusal of the inventory (Ex. P.3T). The respondent valued his furniture and fittings at $8,000 to $10,000 but a licensed auctioneer and appraiser valued them at only $565 (see Ex. D.26). They were 18 years old and, unless any piece could be valued as a genuine antique, the deposit of $3,000 against damage or loss is manifestly absurd. So also was the stock-taking a fiction since the respondent's own witness admitted that that job was never completed. Thus there was no valuation of the stock and $10,900 was no more its real value than $3,000 was the value of the furniture. The logical inference, therefore, is that purchase of the business was not merely a payment for goods and chattels but also for vacant possession of the premises. As I have stated earlier, if that was not what the appellant bargained for, why should the respondent have removed himself and his family?

Against this background then the execution of the two documents of June 20, 1966 must be considered. As early as August 10, 1966 the appellant's letter had stated the reason: see Ex. A.38. It could not have been concocted as an excuse almost a year before the commencement of litigation. Indeed, the respondent admitted as much. "Exhibits P.1 and P.7 are meant to prevent me from having trouble with my landlord", he said, adding, "and also aimed at ensuring that the business was properly run". This afterthought, in my view, must brand the man as an unscrupulous liar. What further interest had he in the business after sale thereof? As his own counsel put it, he must be "either a blundering fool or a knave". It is clear from his conduct that he could not be the former.

The documents which he had instructed his solicitors to prepare speak for themselves, even without his own admission. The deed of partnership (Ex. P.7) gave Lee Cheow Soon, his son, a 5 per cent. share in the partnership for no consideration whatsoever. Article 4 went so far as to provide that —

"4. All the goods, stock-in-trade and fixtures shall belong to Lee Cheow Soon and shall be kept at the business premises."

Of the agreement (Ex. P.1) it will suffice to quote only the recitals: —

"THIS AGREEMENT is made the 20th day of June, 1966 BETWEEN LEE KAH GEE (NRIC NO: 0943498) of No. 87 Batu Ferringhi, Penang, businessman (hereinafter called the Vendor) of the one part and LEE CHEOW SOON (NRIC No: 3773390) of No. 35 Kuala Kangsar Road, Penang, businessman and LEE POOI CHUN (NRIC No: 1406573) married woman of No. 264 Chulia Street, Penang (hereinafter called the Purchasers) of the other part.

WHEREAS the Vendor is carrying on business in the style and firm name of Poh Cheh Medical Hall at No: 35 Kuala Kangsar Road, Penang.

AND WHEREAS the Vendor at the request of the Purchasers has agreed to lease his business in the said Poh Cheh Medical Hall (hereinafter called the Business) to the Purchasers upon payment of the premium of $21,000 for a period of seven (7) years."

The solicitor who drew these documents said: —

"Exhibit P.1 is I agree a curious document — the lease of a business. [Referred to clause 4] — Plaintiff wished to make sure that whilst the business was out of his control, the premises would remain within his control. I was told by plaintiff that the premises were controlled premises. Plaintiff was not assigning the premises, only leasing business. The 'licence' referred to in clause 4 is only the business licence. He did not tell me he had given up possession of premises. If he had, I would not have put in clause 4."

Rent control legislation has been in force in Malaya for a quarter of a century. It is, therefore, idle for this witness to say, "There was no talk at any time of the evasion of rent control". Can there be any other explanation for Lee Cheow Soon being made a partner than to lend colour to a claim that through him the respondent was in occupation of the premises as a member of his family?

That the agreement was a sham is plainly revealed in the first recital, which was a blatant mis-statement of fact; similarly in the second. The business had been the sole property of the appellant since she took delivery thereof on April 26 upon a sale and transfer. Why else did an experienced solicitor use the terms "vendor" and "purchasers"? The issue before the learned trial judge, therefore, was not whether the declaration in clause 4, being understood by the appellant to mean what it says, was binding on her, but whether by the oral agreement it was an agreed term of the contract that the sale of the business included assignment of the tenancy. This issue was never considered.

Since the sham agreement was admittedly with a view to evasion of rent control law, the respondent, by relying on clause 4 thereof, was practising a deceit on the public administration. The illegality was pleaded by the appellant in her defence and should not have been passed over. As their Lordships of the Privy Council said in *Palaniappa Chettiar* v. *Arunasalam Chettiar*,[2] citing a statement of principle by Lord Mansfield:

"No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act".

Without the fictitious agreement to rely on what cause of action was left to the respondent in his statement of claim? The answer must plainly be nothing. He had, pursuant to the oral agreement, delivered vacant possession of the premises to the appellant. If he retained any legal right or estate in the premises the onus was on him to prove it. On what ground could he maintain that what he gave was a mere licence — even so, it was a licence for valuable consideration, not revocable at will — instead of an assignment of the tenancy? Counsel for the respondent submitted

that "Exhibit P.8 is conclusive of the matter whether there was a licence or a tenancy". The simple answer is that this draft agreement was never executed, so as to substitute for the agreement of June 20, 1966, on which the respondent must still depend. The oral agreement of April attached no label of licensor and licensee to the relationship between the parties — indeed the very terms agreed upon as well as the unqualified delivery of vacant possession indicated otherwise. I do not see how *Isaac* v. *Hotel de Paris*[1] can be said to apply where "the circumstances and conduct of the parties show that all that was intended was that the defendant should have a personal privilege of running a night bar on the premises, with no interest in the land at all".

In the instant case I am clearly of opinion that the respondent's claim must fail, once it became clear that the sham agreement was devised to give him a colourable interest in the premises. Had he retained any genuine interest, the subterfuge would not have been necessary. I would therefore allow the appeal and set aside the judgment of the court below. As to costs, I would direct that the appellant be allowed only 75% of her taxed costs by reason of the introduction of irrelevant matter, including the counterclaim, in an excessively prolix defence. The costs of this appeal are allowed in full.

Raja Azlan Shah J. concurred.

Gill F.J.: By an oral agreement on or about April 26, 1966 the respondent leased to the appellant for seven years his medicine shop at premises No. 35, Kuala Kangsar Road, Penang, known as the Poh Cheh Medical Hall. One Sium Foll Min had had discussions previously with the respondent about the lease of both the business and the premises, but they had not come to any firm agreement as Sium did not have sufficient capital to run the medical hall. He therefore introduced the appellant to the respondent. Sium was also involved in the oral lease agreement, as he was to manage the medicine shop on behalf of and was to have some sort of partnership with the appellant, but he made no financial contribution and broke up with the appellant sometime in June.

The question to be answered in this appeal is whether in all the circumstances of the case, the facts of which have been stated in the judgment which has just been delivered by the learned Chief Justice, the appellant obtained a tenancy, or a mere permissive occupation short of a tenancy, of the premises. The answer to that question, in my judgment, turns on the construction to be put on the above-mentioned oral agreement which was pleaded by the respondent himself as the plaintiff in the action.

The parties differ as to the terms of that oral agreement, but it is common ground that in pursuance of that agreement the respondent and his family vacated the whole of the premises, including the living quarters upstairs, and gave exclusive possession of the premises to the appellant who went into occupation on April 27, 1966. It is also not in dispute that, before the parties signed their written agreement on June 20, 1966 (Exhibit P1), the appellant had paid to the respondent a total sum of $10,000 in pursuance of the oral agreement.

The respondent's evidence as regards the terms of the oral agreement was that the appellant was to pay a sum of $3,000 as deposit for furniture, which was returnable on the expiry of the lease, that she was to pay for the stock-in-trade which was valued at $10,900, and that she was to pay a further sum of $21,000 by instalments of $250 per month in respect of the signboard and the Poh Cheh Medical Hall. In the written agreement, this sum of $21,000 was described as premium.

On the other hand, the evidence of the appellant was that the respondent agreed to sell his business for $10,900 which was later reduced to $10,500, that she had paid $10,000 before the written agreement, that she was to pay $250 a month to the respondent towards rent until arrangements were made for her to pay the rent direct to the landlord, and that she agreed to pay a further sum of $3,000 to avoid any trouble between the respondent and the landlord as regards the tenancy.

Irrespective of where the truth lay as to the exact terms of the oral agreement, it would seem clear from the evidence that the written agreement executed by the parties on June 20, 1966 was to protect the appellant from eviction by the landlord. This was admitted by the respondent himself, although reluctantly. Peter Oon (P.W.2), the solicitor who prepared exhibit P1, gave evidence to say that the respondent wished to make sure that, whilst the business was out of his control, the premises would remain within his control, and he went on to say: "He did not tell me he had given up possession of premises. If he had, I would not have put in clause 4."

Clause 4 of the agreement was a declaration by the parties to the effect that the said premises No 35, Kuala Kangsar Road, Penang, were not included in the lease of the business by the vendor to the purchasers, the other purchaser being the respondent's son Lee Cheow Soon, as a partnership agreement between the appellant and Lee Cheow Soon was signed on the same day. Under this partnership agreement Lee Cheow Soon was to have a 5% undivided share in the partnership. Both these written agreements, to my mind, were nothing more than a device on the part of the respondent to try and retain the tenancy of the premises in himself. That would appear to have been the sole object in introducing his son into the partnership business with the appellant.

It is to be observed that the respondent retained no portion of the premises for occupation under the oral agreement. There was no reservation of any such right even in the written agreement of June 20, 1966, assuming that agreement to be relevant to the case, which in my opinion it is not. The respondent had already leased the business before this written agreement. How can it then be said that he had any more business to lease on the date of the written agreement, especially as he had already vacated the premises? As the premises were rent-controlled, it was open to the landlord to retake possession of the premises and turn

out the appellant as a trespasser. It would seem clear, therefore, that it was for the purpose of getting out of that difficulty that the appellant agreed to pay a sum of $3,000 which the respondent told her was to be paid to the landlord. Trouble arose when the respondent tried to get more money out of the appellant for the same purpose. How can the respondent, on the strength of any right which the landlord might have to possession of the premises, reassert a tenancy in himself?

As I have already said, the appellant was given exclusive possession of the premises under the oral agreement. In *Errington* v. *Errington*[3] Denning L.J. said:

"... although a person who is let into exclusive possession is, *prima facie*, to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held only to be a licensee."

In *Facchini* v. *Bryson*[4] the substantial issue was whether the agreement between the parties operated as a tenancy agreement or merely as a licence. It was held that the agreement must be construed as a whole and that the relationship between the parties must be determined by the law and not by the label which they chose to put on it. Somervell L.J. said, at page 1389:

"If, looking at the operative clauses in the agreement, one comes to the conclusion that the rights of the occupier, to use a neutral word, are those of a lessee, the parties cannot turn it into a licence by saying at the end 'this is deemed to be a licence'; nor can they, if the operative paragraphs show that it is merely a licence, say that it should deemed to be a lease."

Denning L.J. said at the same page:

"In all the cases where an occupier has been held to be a licensee there has been something in the circumstances, such as a family agreement, an act of friendship or generosity, or such like, to negative any intention to create a tenancy. In such circumstances it would be obviously unjust to saddle the owner with a tenancy, with all the momentous consequences that that entails nowadays, when there was no intention to create a tenancy at all."

In *Addiscombe Estates, Ltd.* v. *Crabbe*[5] Jenkins L.J. said:

"... the law remains that the fact of exclusive possession, if not decisive against the view that there is a mere licence, as distinct from a tenancy, is at all events a consideration of the first importance."

In the present case, there are clearly no circumstances of the sort mentioned by Denning L.J. in *Facchini* v. *Bryson*[4] to negative any intention to create a tenancy. The facts here are very similar to the facts in the case of *Goh Gok Hoon* v. *Abdul Hamid & Anor.*[6] The agreement here, as in that case, made no reservation whatever for the respondent to have any right to retain any portion of the premises for his own occupation. The leased business was no longer his own after it was taken over by the appellant, so that he could not be said to be in occupation of the premises. The appellant paid the rates and the employees in the shop were her servants. In reply to the appellant's letter of August 5, 1966, the respondent's then solicitor, Mr. Lee Kok Liang, said that the lease was for business goodwill only. In the circumstances, it cannot be understood how the business could be severed from the premises. To use the words of Ismail Khan J. (as he then was) in that case, exclusive possession, especially in the circumstances of this case, was not merely a hall-mark of a tenancy, but it was also in my opinion clear proof that the person having such possession was legally a tenant and not a licensee. The case of *Isaac* v. *Hotel de Paris, Ltd.*,[1] on which counsel for the respondent sought to rely and which found favour with the learned trial judge, has no bearing on the present case, as the respondent in that case was given merely the right of running a night bar to be managed by him on behalf of the respondent company.

I would allow the appeal and set aside the order made by the learned trial judge, and I agree with the learned Chief Justice that for the reasons he has stated the appellant be allowed only 75% of her taxed costs in the court below but that she be allowed full costs of this appeal.

Appeal allowed.

Solicitors: *Karpal Singh & Co.; Lim Cheng Ean & Co.*

GOVERNMENT OF MALAYSIA v. S. DREDGING CO. LTD.

[F.C. (Azmi L.P., Suffian & Gill F.JJ.) March 29, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 51 of 1970]

Income Tax — Double taxation — Tax payable by foreign company — Tax credit due to company under double taxation agreement — Whether tax payable reduced by tax credit — Double Taxation (Relief) (U.K.) Order, 1949 — Income Tax Ordinance, 1947, ss. 40, 45 and 46.

Income Tax — Chargeable income — "Amount of tax payable by the company" — Whether computation includes U.K. tax credit — Income Tax Ordinance, 1947, s. 40(3), s. 46.

Interpretation — Allowance of deduction of tax credit from tax chargeable — Income Tax Ordinance, 1947, s. 40(3) — Change of language in corresponding provision of Income Tax Act, 1967, s. 108(4) — Effect of.

The respondent company for the relevant year of assessment received income both from the United Kingdom and from Malaya. It was assessed to tax on its total world income, less various deductions and allowances permitted under the Income Tax Ordinance, 1947. Tax on its chargeable income for the year of assessment was assessed at $595,620.41. When the company distributed dividends to its shareholders it deducted tax under section 40(1) of the Ordinance and the total amount of such deduction was $829,542.48.

The government contended that the computation of the amount of tax payable by the company for the purposes of section 40(3) of the Ordinance means not the amount of tax ordinarily payable by the company ($595,620.41) on its chargeable income, but that amount as reduced by the tax credit due to the company under section 46 of the Ordinance. The respondent company on the other hand contended that the amount of tax payable by the company means simply the amount of tax payable by it on its chargeable income without deduction of the United Kingdom tax credit. It was agreed that if the contention of the government was